IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

MISC.CIVIL APPLICATION No 1578 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHANDRAKANT M THAKKAR

Versus

GUJARAT HOUSING BOARD THRO' HOUSING COMMISSIONER

Appearance:

1. Misc.Civil Application No. 1578 of 2003

MR GT DAYANI for Petitioner No. 1

MR YN RAVANI for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KUNDAN SINGH

Date of decision: 07/11/2003

ORAL JUDGEMENT

1. Rule. This is an application u/s 24 of the Civil

Procedure Code for transfer of Civil Suit No. 899 of 1990 pending before the Civil Judge (SD), Vadodara to the City Civil Court, Ahmedabad wherein Special Civil Suit No. 5130 of 1992 is pending for hearing or for transfer of Special Civil Suit No. 5130 of 1992 to the Court of Civil Judge (SD), Vadodara where Civil Suit No. 899 of 1990 is pending for hearing. This is a case which involves a question for determining the statutory provisions versus contractual obligation under the agreement.

2. The applicant has filed Special Civil Suit No. 5130 of 1992 before the City Civil Court, Ahmedabad which has arisen out of the work of construction of shopping centre-cum-residential complex, Gorwad, Vadodara by the respondent under the agreement dated 3-9-1987. The respondent is having its principal office in the City of Ahmedabad. Clause 55 of the Agreement provides jurisdiction for determining any dispute which reads as under :

> "All the disputes in respect of this contract shall be subject to the jurisdiction of Courts in Ahmedabad only and no other."

3. The petitioner filed Spl. Civil Suit No. 5130 of 1992 before the City Civil Court, Ahmedabad for a decree of Rs.47,00,183-23. Regarding the same subject matter the respondent Gujarat Housing Board has also filed Civil Suit No. 899 of 1990 against the petitioner for decree of 31,79,504-87 before the Civil Court (SD), Vadodara. During the pendency of the civil suit at Vadodara Court, the applicant raised a preliminary objection regarding jurisdiction by way of filing an application Exh. 7 stating therein that the Civil Judge (SD), Vadodara has no jurisdiction to entertain the said suit. The said application was dismissed by the Court concerned. Thereafter, the petitioner filed Civil Revision Application No. 143 of 1993 before this Court challenging the order passed by the Civil Judge (SD), Vadodara on the application pertaining to the jurisdiction. Ultimately, that Civil Revision Application was dismissed as withdrawn vide order dated 24-6-1993 which reads as under:

> "After arguing the matter for pretty long time, Mr. G.T. Dayani, L.A. for the petitioner seeks permission to withdraw the application at exh.7. He is permitted to withdraw the same and petition is dismissed as withdrawn. In that view of the matter, present revision application cannot

survive and accordingly it is also dismissed."

4. The respondent Board has filed an affidavit-in-reply stating therein that this application u/s 24 of the Civil Procedure Code is not maintainable. It is also stated that while deciding the preliminary objection raised by the applicant, the Baroda Court has decided the application exh. 7 the aspect about territorial jurisdiction against the applicant herein. The Baroda Court framed the issues including the issue no. 4 regarding jurisdiction to try the suit by the said Court and that issue regarding the jurisdiction is yet to be decided by the learned Civil Judge (SD), Vadodara on the basis of any evidence to be led by the parties. It is also admitted in the affidavit-in-reply that these are two suits between the same parties and the subject matter of both the suits are the same. But the proceedings of the suit filed at Ahmedabad Court are required to be stayed u/s 10 of the Civil Procedure Code. Otherwise, the same is required to be transferred to Baroda Court being a subsequent suit. Hearing of the suit filed at Ahmedabad Court has yet not started. While the proceedings of the suit filed before the Baroda Court has ripen for hearing. It is also stated in the said affidavit-in-reply that the applicant resides at Bhuj and is attending the Court proceedings at Baroda or Ahmedabad will be a similar situation for him. On the other hand, as the contract was entered into and executed at Baroda, and transaction took place in Baroda the officers at Baroda of the opponent Board are well conversant with the facts.

5. Learned counsel for the petitioner submitted that there is a Clause 55 of the Agreement ousting the jurisdiction of any Court in respect of the subject matter except in the Court at Ahmedabad. As such, the suit filed by the respondent in Baroda Court is not maintainable in the eye of law. He has relied on the decision of the Supreme Court in the case of A.B.C. Laminart Pvt. Ltd. and Another V. A.P. Agencies, Salem, reported in 1989 (2) Supreme Court Cases, 163, wherein it has been held as under :

"Admittedly the parties have transacted the business inter-alia on the basis of clause 11. There is, therefore no aspect from the conclusion that Clause 11 formed part of the agreement and the parties would be bound by it so long as they would be bound by the contract itself. It is not open to the respondent to deny existence of clause 11.

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From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expression unius est exclusio alterius' expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all other from its operation may in such cases be inferred. It has therefore to be properly construed."

6. Learned counsel for the petitioner has also relied on the decision of the Supreme Court in the case of M/s. Angile Insultations V. M/s. Davy Ashmore India Ltd. and another, reported in AIR 1995 SC 1766, on the basis of the earlier decision in the case of A.B.C. Laminart Pvt. Ltd. (supra) has held as under :

"The agreement under which Clause (21) was incorporated as one such clause, the parties are bound by the contract. The contract had not been pleaded to be void and being opposed to S.23 of the Contract Act. As seen, Clause (21) is unambiguous and explicit and that, therefore, the parties having agreed to vest the jurisdiction of the Court situated within the territorial limit of High Court of Karnataka, the Court of subordinate Judge, Dhanbad in Bihar state has no jurisdiction to entertain the suit laid by the appellant. Therefore, the High Court was right in upholding the order of the trial Court returning the plaint for presentation to the proper court."

7. On the other hand, the learned counsel for the respondent contended that the suit filed at Ahmedabad

Court is not maintainable in view of the fact that the subject matter of both the suits, one filed at Baroda Court and other filed at Ahmedabad Court is one and the same. As such, the civil suit filed at Ahmedabad Court being subsequent suit is required to be stayed u/s 10 of the Civil Procedure Code. Section 10 of the Civil Procedure Code reads as under :

"No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue is a previously instituted suit between the same parties, or between the parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [India] having jurisdiction to grant the relief claimed or in any Court beyond the limits of [India} established or continued by [the Central Government] and having like jurisdiction, or before the Supreme Court.

Explanation :

The pendency of a suit in a foreign Court does not preclude the Courts in (India) from trying a suit founded on the same cause of action."

8. It is pointed by the learned counsel for the respondent that under the provisions of O. VIII R. 6A of the Civil Procedure Code the petitioner is entitled to to file a counter claim which is maintainable u/s O.8 R.6A of the CPC even the suit filed by the respondent is withdrawn, the counter claim of the petitioner will continue as per the provisions of O.8 R.6D of the CPC, wherein it is provided that if in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

9. The petitioner has apprehension that in case issue no. 4 regarding jurisdiction framed in the suit filed at Baroda Court is decided and held that Baroda Court has no jurisdiction, then, the suit will be proceeded only in Ahmedabad Court and the plaintiff will have to suffer great inconvenience for retrial of the suit filed at Ahmedabad Court after having contesting the suit filed at Baroda Court.

10. I have carefully considered the contentions advanced by the learned counsel for the parties and perused the relevant material on the record.

11. So far as maintainability of the suit filed at Ahmedabad Court is concerned, it cannot be said at this stage that it is not maintainable in view of the provisions of Section 10 and O.VIII R.6A of the Civil Procedure Code. O.VIII R.6A of the CPC provides as under:

> "6A - Counter-claim by defendant - (1) A defendant in a suit may, in addition to his right of pleading a setoff under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not."

12. The provisions of O.VIII R.6A of the Civil Procedure Code give liberty to the defendant right to file a counter-claim or he may be at liberty to file a separate suit. If separate suit is filed, it cannot be said that the separate suit is not maintainable and nothing has been shown before this Court or any binding authority has been cited that the suit filed in respect of the same subject matter would be barred by any statutory provisions of any law. As such, the suit filed by the petitioner cannot be said at this stage that it is not maintainable in the eye of law.

13. So far as the jurisdiction of the Baroda Court for trying Civil Suit NO. 899/90 is concerned, undoubtedly the Supreme Court has held that the Clause of the agreement ousting the jurisdiction of other Court except the Court mentioned therein is to be honoured by the parties. But in the present case in that respect the objection was raised before the trial Court by filing an application and the trial Court has rejected the said application holding that the Baroda Court has jurisdiction to try the suit. Against that order, aforesaid Civil Revision Application was filed before this Court. It appears that the learned counsel for the petitioner had advanced several arguments and placed reliance on the decision of the Supreme Court which has been cited before me also. But this Court has not accepted the said decision of the Supreme Court. Thereafter, the petitioner was permitted to withdraw that civil revision application including the application

exh.7 which was filed before the trial Court in view of the fact that the Court has framed the issues including issue no .4 regarding jurisdiction of the Court. No doubt, Section 24 (5) of the Civil Procedure provides that a suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it. As the issue regarding the jurisdiction in the present case is still pending before the trial Court, these provisions of Section 24 (5) are not applicable in the present case. Moreover, exercise of power under Section 24 (5) of the Civil Procedure Code is discretionary and it is not mandatory in view of the fact that provision of Section 24 (5) of the Civil Procedure Code provides that a suit or proceeding may be transferred as it is not mandatory that the suit or the proceeding must be transferred. Moreover, on the other hand under Section 24 of the Civil Procedure Code this Court has general power of transfer and withdrawal of the proceeding on the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage, transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it which has or has no territorial jurisdiction for decision or retransfer the same for trial or disposal to the Court from which it was withdrawn. Thus, the provision of Section 24 of the Civil Procedure Code confers the power to this Court to transfer the proceeding or suit from one court to another Court having competent jurisdiction for decision. At earlier point of time, the civil revisional application was withdrawn by the petitioner which was filed raising the question regarding the jurisdiction of the Court. If this Court considers the present transfer application then that would amount to review of the said order of withdrawn which I am not inclined to do so. As the Vadodara Court has taken cognizance of the suit filed there that the proceedings should continue, it would be proper that the suit filed before the City Civil Court, Ahmedabad be transferred and tagged with Civil Suit No.899 of 1990 pending before the Civil Judge (SD), Vadodara and the court concerned be directed to decide the said suits in accordance with law. As both the parties would have opportunity to lead their evidence and advance the arguments before the same Court and the same Court will be in a position to decide both the suits in the interest of justice.

14. Considering the submissions made by the learned counsel for the parties, material on record and statutory provisions of the law, this application is allowed in

part and Special Civil Suit No. 5130 of 1992 pending before the City Civil Court, Ahmedabad is ordered to be transferred to Civil Court (SD), Vadodara, where Civil Suit No. 899 of 1990 is pending, with a direction to the Civil Judge (SD), Vadodara to consider and decide Special Civil Suit No. 5130 of 1

899 of 1990 in accordance with law after giving reasonable opportunity of leading evidence and hearing to the parties concerned with a liberty to the learned counsel for the respondent to raise objection that the proceeding of Special Civil Suit No. 5130 of 1992 should be stayed under the provision of Section 10 of the Civil Procedure Code. If any such objection is raised, it would be open to the Court concerned to decide the said contention, if raised by the respondents, in accordance with law. Rule is made absolute to the aforesaid extent, with no order as to costs.

(Kundan Singh,J)

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